Supreme Court, U.S.
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No. 94-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 951, AFL-CIO AND CLC,

Petitioner,

v.

PHILLIP MULDER, CHARLES BUCK, AND LEON GIBBONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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January 13, 1995

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Were the lower federal courts correct in holding that they lacked jurisdiction to enforce against nonmember employees, who objected to the amount of agency fees demanded from them, an internal-union "rebate" scheme which culminated in two non-contractual, non-consensual, internal-union "arbitrations?"

2. Were the lower federal courts correct in refusing to summarily turn the results of two non-contractual, non-consensual, internal-union "arbitrations" into binding federal court judgments?

PARTIES TO THE PROCEEDINGS

Petitioner is the United Food and Commercial Workers, Local 951, AFL-CIO and CLC, a union representing employees of, *inter alia*, Meijer, Inc. Respondents are Phillip Mulder, Charles Buck and Leon Gibbons, three employees of Meijer who work within the bargaining unit covered by Local 951. Each Respondent has resigned from membership in Local 951 and filed objections pursuant to *Communications Workers v. Beck*, 487 U.S. 735 (1988).

The National Labor Relations Board ("NLRB") intervened successfully in the District Court and received a partial stay of the proceedings. However, the NLRB filed nothing further with the District Court regarding the merits of the case and nothing with the Court of Appeals. The NLRB, through the Solicitor General, has indicated to the Clerk of this Court that it will file nothing related to the instant Petition. As such, Respondents do not believe that the NLRB continues to be a "party to this proceeding."

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UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 951, AFL-CIO AND CLC,

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PHILLIP MULDER, CHARLES BUCK, AND LEON GIBBONS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents Phillip Mulder, Charles Buck and Leon Gibbons ("Respondents" or "nonmembers") are employed by Meijer, Inc. ("Meijer"), a large supermarket chain based in Grand Rapids, Michigan. Pursuant to the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, Respondents are represented for purposes of collective bargaining by Petitioner United Food and Commercial Workers, Local 951, AFL-CIO and CLC. ("Petitioner" or "Local 951.")

The collective bargaining agreement negotiated by Meijer and Local 951 contains a "union security clause." This clause requires all covered employees to either join the union or pay a "service fee" as a condition of employment. However, this clause does not mention or in any way specify *how* Local 951 will deal with nonmember employees (like Respondents Mulder, Buck and

Gibbons) who object to the use of their service fees for nonrepresentational purposes, or *how* the union will calculate a reduced fee for those employees, as required by *Communications Workers v. Beck*, 487 U.S. 735 (1988).

Respondents were formerly members of Local 951, but each resigned in 1988 or 1989. Simultaneously with their resignations, each Respondent notified Local 951 that he objected under *Beck* to paying any amount of "service fees" except those used for collective bargaining, contract administration and grievance adjustment.

In response, Local 951 sent each Respondent its "Service Fee Rebate Procedure." (Petition for Certiorari, Appendix at A62-A68.) In pertinent part, this "Service Fee Rebate Procedure" creates a non-contractual, non-consensual, internal-union "arbitration" scheme to determine the chargeable amount of the "service fee." It is also critical to note that this "Service Fee Rebate Procedure" is not a part of the Meijer—Local 951 collective bargaining agreement, but rather was created internally and unilaterally by Local 951.[1]

Beginning on November 9, 1988, and at various times since, Respondents filed several unfair labor practice charges with the NLRB against Local 951 concerning the legality of the "Service Fee Rebate Procedure" and the amount of the "service fees" collected by Local 951. In those charges, Respondents requested the NLRB, *not* Local 951's internal "arbitrator," to determine the proper amount of the service fee that can be required under *Beck*. After investigation, the NLRB General Counsel issued formal complaints

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[1] The differences between the Meijer—Local 951 collective bargaining agreement and Local 951's internal "Service Fee Rebate Procedure" are dramatic. For example, while the voluntary arbitration provisions of the Meijer—Local 951 collective bargaining agreement create both a right of mutual selection of a single arbitrator and a mutually-selected tripartite "Grievance Adjustment Board," the "Service Fee Rebate Procedure" provides no such choices with regard to the compulsory "arbitration" which Local 951 seeks to foist upon the Respondents and other nonmembers who object to the amount of the "service fee."

against Local 951, which remain pending at this time before an administrative law judge.[2]

After the NLRB complaints were issued, Local 951 actually invoked against the Respondents the "arbitration" scheme contained in its "Service Fee Rebate Procedure." With regard to that scheme, it is undisputed, and the District Court so found, that: a) none of the Respondents was given any opportunity to be involved in the selection of Local 951's "arbitrators;" b) none of the Respondents ever consented to the selection of those "arbitrators" or the rules contained in the "Service Fee Rebate Procedure;" and c) none of the Respondents agreed to be bound by any decisions rendered by Local 951's "arbitrators," nor did they ever agree that such "arbitration" decisions would become final and binding so as to permit the entry of federal court judgments. In short, it is undisputed—and the District Court so found—that there was no agreement whatsoever between Local 951 and the Respondents to arbitrate any dispute and be bound by the result! (Report and Recommendation of the Magistrate Judge, reprinted in Petition for Certiorari, Appendix at A32; Decision of the District Court, reprinted in Petition for Certiorari, Appendix at A21.)

Nevertheless, Local 951 twice sued the Respondents, seeking to have the federal courts summarily "confirm" the results of those non-consensual "arbitrations" and turn them into binding judgments with *res judicata* and collateral estoppel effect. The NLRB successfully intervened in the federal court lawsuits, over the objection of Local 951, and received a partial stay against Local 951.[3]

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[2] The formal NLRB complaints challenge the legality of many aspects of Local 951's "Service Fee Rebate Procedure," as well as Local 951's inclusion of organizing and similar expenses in the chargeable amount of the fee demanded from the Respondents.

[3] In its Brief in Support of the Petition for Certiorari at 6, n.1, the Petitioner misstates one aspect of the proceedings below. Contrary to the statement of the Petitioner, the NLRB *successfully* sought to stay Local 951's lawsuits. (Appendices A and B.) It was *only* the Respondents' ultimately successful Motion for Summary Judgment which actually proceeded further in the District Court.

On Respondents' Motion for Summary Judgment, the Magistrate Judge and the District Court refused to confirm Local 951's "arbitrations," holding that the federal courts had no jurisdiction to enforce such non-consensual, non-contractual, internal-union proceedings.[4] A unanimous panel of the Sixth Circuit affirmed, and Local 951's Petition for Rehearing and Rehearing *en banc* was denied, with no judge in active service voting to rehear the case.[5]

REASONS FOR DENYING THE WRIT

THE LOWER COURTS WERE CORRECT IN REFUSING TO CONFIRM LOCAL 951'S TWO NON-CONTRACTUAL, NON-CONSENSUAL, INTERNALLY GENERATED "ARBITRATIONS" AND TURN THEM INTO BINDING JUDGMENTS. IT IS UNDISPUTED THAT THERE WAS NO AGREEMENT BETWEEN LOCAL 951 AND THE RESPONDENTS TO ARBITRATE ANY DISPUTE AND BE BOUND BY THE RESULT, AND THUS NO LEGITIMATE ARBITRATION AWARDS TO CONFIRM.

A.) The Lower Courts Were Absolutely Faithful To This Court's Precedents.

It is undisputed that there was no agreement between Local 951 and the Respondents to arbitrate and be bound by the result. (Report and Recommendation of the Magistrate Judge, reprinted in Petition for Certiorari, Appendix at A32; Decision of the District Court, reprinted in Petition for Certiorari, Appendix at A21). That single fact is determinative, for this Court has long held that the *sine qua non* of any enforceable arbitration award is *agreement* and

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[4] The Report and Recommendation of the Magistrate Judge is unofficially reported at 141 L.R.R.M. (BNA) 2449 (W.D. Mich. 1992). The decision of the District Court is officially reported at 812 F. Supp. 754 (W.D. Mich. 1993).

[5] The decision of the Court of Appeals for the Sixth Circuit is officially reported at 31 F.3d 365 (1994).

consent among the parties to subject their dispute to arbitration and be bound by the result. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

> The Congress ... assigned to the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made.

Id. at 582 (emphasis added); *AT&T Technologies v. CWA*, 475 U.S. 643, 648-49 (1986) (reaffirming *Warrior & Gulf Navigation Co.*, and holding that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law"); *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991); *Litton Financial Printing v. NLRB*, ___U.S. ___, 111 S. Ct. 2215, 2222-2223 (1991) ("We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.... [T]he statutory policy [of the NLRA is] that arbitration is not compulsory.")

Local 951's Petition fails to cite, let alone distinguish, this Court's many governing precedents upon which the Magistrate Judge, District Judge, and Sixth Circuit expressly relied in refusing to confirm the non-contractual, non-consensual, internal-union "arbitrations." Instead, Local 951 relies upon a series of "naked *ipse dixits*" (Report and Recommendation of the Magistrate Judge, reprinted in Petition for Certiorari, Appendix at A32) to ignore and obscure this Court's very consistent holdings that "arbitration is a matter of contract and a party cannot be required to submit to

arbitration any dispute which he has not agreed to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

Local 951 clouds the real issue—whether two non-consensual "arbitrations" may be summarily confirmed and turned into binding federal court judgments—by cleverly insinuating that its lawsuits against Respondents actually concern the enforcement (or arise under the "penumbras") of the collective bargaining agreement negotiated between itself and Meijer. (Petition for Certiorari at 13-14.) The reality is that Local 951's quixotic lawsuits to confirm its non-consensual, non-contractual "arbitrations" do not arise from or in any way implicate the Meijer—Local 951 collective bargaining agreement (or any other "contract" as defined by § 301, 29 U.S.C. § 185, or the Federal Arbitration Act), but rather arise solely from the internal-union "Service Fee Rebate Procedure."

> The arbitrations at issue did not arise from a collective bargaining agreement or any other agreement between [Local 951] and [the Respondents] but rather from the internal-Union Procedure. The internal Procedure was unilaterally instituted by the Union and was not the subject of an agreement between the Union and the employees. Thus, the Procedure did not contemplate or include an agreement by [the Respondents] to arbitrate their disputes with the Union. Absent such an agreement, the arbitrators' judgments cannot be enforced by this Court.

(Opinion of the District Court, reprinted in Petition for Certiorari, Appendix at A23.)

Furthermore, Local 951's lawsuits do not require any interpretation, review or enforcement of the Meijer—Local 951 collective bargaining agreement, since that collective bargaining agreement and its union security clause are silent concerning *how* Local 951 will deal with nonmember employees who object to the use of their service fees, or *how* the union will calculate a reduced fee for those employees as required by *Beck*. As such, the mere existence of that collective bargaining agreement provides no jurisdictional basis for

the confirmation of the two non-consensual, non-contractual "arbitrations" at issue in this case. While Local 951 struggles mightily to make its confirmation lawsuits appear to be nothing more than routine disputes arising under the Meijer—Local 951 grievance and arbitration clause—and thus within the "penumbras" of § 301—nothing could be further from the truth. The Respondents' *Beck* objections were *not* processed under the terms of the Meijer—Local 951 collective bargaining agreement, but rather under Local 951's "Service Fee Rebate Procedure" only. (Opinion of the District Court, reprinted in Petition for Certiorari, Appendix at A23.)

In short, the decisions of the Magistrate Judge, District Judge and Court of Appeals were faithful to this Court's longstanding precedents upholding arbitrations *only* where the parties have consented to such a process and agreed to be bound by the result. This case provides the Court with no reason to deviate from its longstanding precedents.

B.) This Court Has Recognized That Employees Challenging A Union's Agency Fee Seizures May Choose From Several Different Fora To Protect Their Rights.

In *Beck*, this Court specifically held that nonmember employees have an absolute right to challenge a union's agency fee seizures before either the NLRB or the federal courts. *Beck*, 487 U.S. at 742-45. Nothing in *Beck* (or this Court's earlier cases such as *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)) supports the notion that the mere existence of a union security clause in a collective bargaining agreement enables a union to compel a nonmember to use a separate, non-contractual, non-consensual, internal-union procedure as his *exclusive* means of challenging the agency fee seizures. The Sixth Circuit properly construed *Beck* and *Hudson* to require only that informal procedures be made available to nonmember employees, not that the employees use them as an exclusive forum. (Decision of the Sixth Circuit, reprinted in

Petition for Certiorari, Appendix at A5, citing *Hudson*, 475 U.S. at 308.)

Moreover, it is not a novel concept in labor law that employees may freely choose from among several "tracks" to protect themselves from unlawful union conduct. In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held that employees have the right to litigate duty of fair representation claims in either the NLRB's forum or separately, in federal court. Here, the Respondents made their choice—the NLRB—and Local 951 does not like it, particularly since the NLRB has agreed with the Respondents and issued formal complaints challenging several aspects of Local 951's procedures and seizures. *See* note 2, *infra.*

Under the principles of *Beck* and *Vaca v. Sipes*, however, Local 951 cannot suddenly thrust its own internal, non-consensual "forum" in front of the Respondents and by doing so invalidate the choice-of-forum that they had previously made. Given the fact that Respondents chose to place the underlying statutory, duty of fair representation and *Beck* issues before the NLRB, Local 951's internal "arbitrations" and subsequent lawsuits are little more than procedural maneuvers designed to trump the NLRB and bully the Respondents and their fellow employees.[6]

A careful review shows Local 951's position to be curiously self-contradictory. At the outset, Local 951 innocently claims that its "Service Fee Rebate Procedure" contains an appeal mechanism "which *may* be invoked by non-Union, bargaining unit members who object to the Union's calculation of the chargeable portion of the service fee." (Petition for Certiorari at 5.) Stated this way,

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[6] Respondents submit that few of their fellow employees will have the fortitude to object to Local 951's agency fee calculations if the result is that they must hire a lawyer and annually defend against Local 951's federal court confirmation lawsuits. They also believe that Local 951 quite clearly recognizes the chilling effect of its confirmation lawsuits on nonmembers. *See Complete Auto Transit v. Reis*, 451 U.S. 401 (1981) and *Building Material & Dump Truck Drivers v. Traweek*, 867 F.2d 500, 507-08 (9th Cir. 1989), which immunized individual employees from § 301 lawsuits for precisely this reason.

Local 951 appears to be doing a good thing, by giving the Respondents an opportunity *if they so choose* to avoid formal litigation before the NLRB or the courts. For the remainder of its Petition, however, Local 951 retreats to *ipse dixits* and insists that the Respondents have no choice at all—they are *compelled* by some mysterious legal force (or "penumbras") to use *only* the internal-union "arbitration" procedure, whether or not they have previously chosen another forum, such as the NLRB. To make matters worse for the Respondents, Local 951's brand of compelled "arbitration" automatically converts into a binding federal court judgment.

The Magistrate Judge precisely summarized the error in Local 951's position and his words bear repeating. He stated:

> By analogy to [*Chicago Teachers Union v.] Hudson*, ... the Union argue[s] (although *Beck* never addressed the question) that it was obliged to grant objecting nonmembers an internal procedure, just as a public-sector union is required to do, to resolve fee disputes. From this assumption, the Union leapt to the conclusion that the outcome of the procedure would support a judgment of the court.
>
> In so arguing, the Union mistook *duty* for *power*. By analogy to *Hudson*, the Union has a duty to provide nonmembers with an impartial forum for resolving fee disputes. The Union has yet to point to any source of *power* to coerce nonmembers to avail themselves of such a forum if they are unwilling to do so, such that the result of the proceeding will support a judgment.

(Report and Recommendation, reprinted in Petition for Certiorari, Appendix at A51, emphasis in original.)

The Magistrate Judge's analysis of Local 951's position and its lack of legal support in this Court's cases was flawless. None of the decisions protecting the right of employees to refrain from funding a union's political and non-collective bargaining agenda supports the Kafkaesque "logic" that they are compelled to "arbitrate" even when they have not agreed to be bound and

steadfastly refuse to do so. *Hudson*, 475 U.S. at 308 n.21 ("arbitrator's decision would not receive preclusive effect..."); *Tierney v. City of Toledo*, 917 F.2d 929, 939-40 (6th. Cir. 1990) (striking down provision in union rebate plan requiring "exhaustion" of internal-union procedures); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992) (while union may have a duty to provide an internal procedure as an alternative to litigation, there is no *requirement* that employees actually use it); *Abrams v. CWA*, 818 F. Supp. 393 (D.D.C. 1993) (same).

In short, nonmember employees have several fora from which to choose in challenging a union's agency fee seizures, and it is their choice, not the union's, which governs. For this reason, Local 951's attempt to foist its internal "arbitration" forum upon the Respondents must fail!

C.) This Case Presents No Issue That Would Warrant The Issuance Of The Writ.

Absent from Local 951's Petition for Certiorari is any discussion of a conflict among the circuit courts with regard to the issues presented in this case, because none exists! Indeed, the only other federal decisions directly applying this Court's arbitration precedents to the agency fee context wholeheartedly agree with the result reached here. *Hohe v. Casey*, 956 F.2d at 408-09; *Abrams v. CWA*, 818 F. Supp. at 406-07.

Nor does Local 951 cite any overriding public policy reason for this Court to grant review in this case. The Court's precedents rejecting compelled "arbitration" are clear and unmistakable. No public policy interest is served by forcing non-consenting employees to utilize an internal-union procedure as the sole and exclusive forum to protect their rights under *Beck* and the duty of fair representation.

Local 951 attempts to pander to this Court by arguing that "the floodgates" will open unless this Court condemns nonmembers to non-consensual internal-union fora. (Petition for Certiorari at 11.)

This argument is remarkable, for it is Local 951 which apparently intends to annually re-file its "confirmation" lawsuits *ad nauseam*. In contrast, most of the legal issues raised by the Respondents in their NLRB filings (*e.g.*, whether organizing expenses are chargeable) should not recur once authoritatively decided. So who is flooding the courts, nonmember employees like the Respondents or Local 951?

In any event, *Beck* unequivocally permits nonmember employees to raise their claims before either the NLRB or the federal courts. The courts can easily decide those *Beck* cases that come before them, and indeed, have a duty to do so. Arguments concerning a "flood"—to alarm the Court into mandating use of non-consensual, non-contractual, internal-union "arbitrations"—are misleading and wrong. Moreover, the Due Process Clause as well as Article III of the Constitution would be violated if such non-consensual "arbitrations" were mandated and given the force of law.

CONCLUSION

The Petition should be denied; alternatively, this Court should grant the Petition and summarily affirm the decision of the Court of Appeals.

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Attorney for Respondents

January 13, 1995

APPENDIX A

ORDER OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

December 9, 1991

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOCAL 951 UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO,	)	[File & Clerk's stamp omitted in printing]
Plaintiff,	)	Case No. 1:91cv 623
v.	)	Honorable Douglas W. Hillman
PHILLIP MULDER, et al.,	)	
Defendants.	)	

ORDER ALLOWING INTERVENTION OF NATIONAL LABOR RELATIONS BOARD AND STAYING PROCEEDINGS IN PART

The National Labor Relations Board (NLRB) has moved for leave to intervene as a party defendant in the captioned case. The NLRB has also moved to stay all proceedings in this action until resolution of unfair labor practice charges against plaintiff presently pending before the NLRB. Plaintiff opposes both motions; defendants do not oppose intervention but oppose the stay. The court conducted a hearing on both motions on December 9, 1991, and set forth oral findings and conclusions for the record. For the reasons set forth on the record:

IT IS ORDERED that the motion for intervention of the National Labor Relations Board (docket # 19) be and hereby is GRANTED, the court finding that the NLRB meets the requirements of Fed. R. Civ. P. 24(b) for permissive intervention. Intervening defendant NLRB is granted 60 days in which to file its answer or other responsive pleading.

IT IS FURTHER ORDERED that the motion of the NLRB for stay (docket # 20) be and hereby is GRANTED IN PART and DENIED IN PART. All proceedings in this action are hereby stayed except for proceedings on the pending motion of defendants (docket # 6) for dismissal or for summary judgment. With regard to that motion, plaintiff is hereby granted ten days in which to file a supplemental brief opposing the motion. Defendants are granted ten days after service of plaintiff's supplemental brief in which to respond. NLRB may, if it so desires, file a brief setting forth its position within the time allowed to defendants herein. Plaintiff and defendants may respond to any submission of the NLRB within ten days after service. All briefs filed hereunder shall not exceed ten pages in length. The court hereby notifies the parties that it elects to treat defendants' motion as a motion for summary judgment, as both plaintiff and defendants have submitted matter outside the pleadings. *See* **Fed. R. Civ. P.** 12(b)(6).

IT IS FURTHER ORDERED that the denial of NLRB's motion for a complete stay is without prejudice, and that the NLRB may renew its motion if defendants' motion for summary judgment is denied.

DONE AND ORDERED this 9th day of December, 1991.

/s/
Joseph G. Scoville
U. S. Magistrate Judge

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

March 3, 1992

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED FOOD & COMMERCIAL WORKERS LOCAL 951,

[File & Clerk's stamp omitted in printing]

Plaintiff,

-vs-

Case No. 1:91-cv-623

PHILIP MULDER, CHARLES BUCK, AND LEON GIBBONS,

Defendants,

and

NATIONAL LABOR RELATIONS BOARD,

Intervenor.

_____/

ORDER OVERRULING OBJECTIONS AND AFFIRMING MAGISTRATE JUDGE'S DECEMBER 9, 1991 ORDER

In accordance with the opinion issued today,

IT IS ORDERED that the United Food & Commercial Workers, local 951's objections (Docket # 31) to United States Magistrate Judge Joseph G. Scoville's order of December 9, 1991 are **OVERRULED.**

IT IS FURTHER ORDERED that United States Magistrate Judge Joseph G. Scoville's order of December 9, 1991 (Docket # 29) is **AFFIRMED**.

/s/
Douglas W. Hillman
Senior Judge

Dated: MAR 3 1992